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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

No. 74.

LEWIS K. STONER, Petitioner,

vs.

NEW YORK LIFE INSURANCE COMPANY.

RESPONDENT'S BRIEF.

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RESPONDENT'S BRIEF.

STATEMENT.

OPINION BELOW.

This is a proceeding to review by writ of certiorari the judgment of the United States Circuit Court of Appeals for the Eighth Circuit in the cause of New York Life Insurance Company, a corporation, Appellant, v. Lewis K. Stoner, Appellee, which is docketed as Cause No. 11,450 in that Court. The case is reported in 109 Fed. (2d) beginning at page 874.

The three opinions of the Circuit Court of Appeals are found in the Transcript of Record at pages 105 to 124. The principal opinion of Judge Dewey begins at page 105 of the Transcript. The dissenting opinion of Judge

Thomas begins at page 113 of the Transcript. The opinion of Judge Van Valkenburgh, concurring in the principal opinion of Judge Dewey, begins at page 120 of the Transcript.

THE JUDGMENT OF THE DISTRICT COURT.

The "Memorandum Opinion, Findings and Conclusions, Declaratory Judgment" rendered by the district court are set out in the Transcript at pages 95 to 100. In this memorandum opinion the District Judge made specific findings of fact with respect to the alleged disability of the insured. After stating his conclusion of the law applicable (Tr. 99) the District Court made a general finding of fact in favor of the insured upon the ultimate issues involved and rendered a declaratory judgment (Tr. 100) in favor of the insured which was reversed by the Circuit Court of Appeals (Tr. 124).

THE PETITION FOR CERTIORARI.

On October 14, 1940 (Tr. 128), this Court granted a petition for writ of certiorari and assigned this case for argument immediately following cause No. 45, which involved a question similar to that said to be involved here.

The reasons relied upon for the allowance of the writ are set out in the petition therefor at pages 7 to 11 thereof. The reasons are as follows:

> (a) "The court below erroneously held that it was bound to look only to the decisions of the Supreme Court of Missouri to ascertain the law of the state; that the Missouri courts of appeals were 'intermediate courts' and in determining what is 'the law of the state' within the meaning of the Erie case it was not bound to follow the decisions of those courts; and it refused to follow them."

(b) "The court below has erroneously decided an important question of local law not only directly contrary to the decisions of the Kansas City Court of Appeals in actions between the same parties on the same subject and on identical facts, but also contrary to the settled law of the state declared with unanimity by its three courts of appeals (Kansas City, St. Louis and Springfield) in an unbroken line covering more than a third of a century."

(c) "The decision of the court below is erroneous in that it ignores and fails to follow the decisions of the Supreme Court of Missouri approving and citing as authority the decisions of the courts of appeals and promulgating the identical rule of law to determine 'total disability' announced by those courts."

(d) "In ruling that the policies are plain and unambiguous and not open to interpretation, the decision of the court below is erroneous and in conflict with the decisions of the Supreme Court of Missouri as well as the decisions of all of its courts of appeals."

(e) "The majority opinion as to the facts is opposed to the undisputed facts in the record and its conclusion upon the facts stated is erroneous and contrary to the decisions of the Missouri cases."

(f) "Without any evidence to show that the amount in controversy exceeded the jurisdictional amount which was put in issue by the answer the court below erroneously directed the district court to enter a declaratory judgment as prayed in favor of respondent."

The assignment of this case for argument following Case No. 45, **West v. American Telephone and Telegraph Company**, indicates that the chief interest of the Court in the review of the decision of the Circuit Court of Appeals involves the question of whether or not the Missouri law was properly applied and due regard was given by the Circuit Court of Appeals to the opinions of the Kansas City Court of Appeals hereinafter referred to.

HISTORY OF LITIGATION.

This action for a declaratory judgment is one of a series of cases growing out of the controversy, arising in September, 1933, between the Petitioner and Respondent over the existence of total and permanent disability. The Petitioner was injured June 29, 1931, and received on the contracts here involved, the monthly income and waiver of premium benefits on account of total and presumably permanent disability until September 29, 1933. Without dispute until September 29, 1933, the Respondent paid Petitioner $3,375.00 in monthly income benefits at the rate of $125.00 per month, and Respondent also waived premiums during this period totaling $864.65 (Tr. 35-36). Before any payment was made for October, 1933, Petitioner was notified that he was no longer considered continuously totally disabled and that no further income payments would be made or premiums waived (Tr. 81).

Thereafter, the Petitioner filed an action in the Circuit Court of Buchanan County, Missouri, against Respondent to recover disability benefits from September 29, 1933, until March 24, 1934. This was tried, resulting in a jury verdict and judgment for Respondent. This judgment was reversed and remanded by the Kansas City Court of Appeals. **Stoner v. New York Life Insurance Co.** (Mo. App.), 90 S. W. (2d) 784. That action is still pending and has not been retried.

Upon the reversal of the judgment in its favor by the Kansas City Court of Appeals and the remand of the cause for a new trial, Respondent herein filed an application for certiorari in the Supreme Court of Missouri to review the opinion and judgment of the Kansas City Court of Appeals. The application for certiorari is set out at page 47 of the petition for the writ in this case. This application for certiorari was denied by the Supreme Court

of Missouri. The order of denial is set out at page 53 of the petition for the writ in this case. Petitioner intimates that the denial of this petition by the Supreme Court of Missouri was a review and affirmance of the opinion of the Kansas City Court of Appeals on the first appeal (90 S. W. [2d] 784). There is no merit in this contention. (See Point V hereof.)

In June, 1936, Petitioner instituted separate actions simultaneously in the Circuit Courts of Buchanan and Platte Counties, Missouri. Each of these last actions was founded upon two of the four policies and sought benefits for the period commencing April 29, 1934, and ending May 29, 1936. The Platte County case was sent to Davies County on a change of venue, where it was subsequently tried. Upon the filing of these last two suits, Respondent, insurer, filed a suit in equity in the United States District Court for the Western District of Missouri to restrain the prosecution of the actions pending in state courts and to secure a determination in the District Court on the issue of the total disability alleged to be common to all suits. The District Court dismissed this suit and its judgment was affirmed by the Court of Appeals of the Eighth Circuit. **New York Life Ins. Co. v. Stoner,** 92 Fed. (2d) 845.

In the meantime the state court action, sent to Davies County on a change of venue from Platte County, was tried, resulting in a jury verdict for Petitioner, the insured. This judgment was reversed and remanded by the Kansas City Court of Appeals. **Stoner v. New York Life Ins. Co.,** 232 Mo. App. 1048, 114 S. W. (2d) 167, and the cause remanded to the Davies County Circuit Court for retrial, where it is now pending.

On January 8, 1938, about three weeks before rendition of the opinion of the Kansas City Court of Appeals reported in 114 S. W. (2d) 167, this action was instituted (Tr. 1).

No further trials have been had in the state courts pending the final determination of this action. The reported opinions cited hereinabove may be resorted to for further details.

THE CONTRACTS INVOLVED.

Except for amounts, the total and permanent disability provisions of each of the four contracts of insurance involved are identical. The pertinent provisions with reference to total and permanent disability are as follows (Tr. 21-23):

> "Total and Permanent Disability.
>
> "**Disability shall be considered total whenever the insured is so disabled by bodily injury or disease that he is wholly prevented from performing any work, from following any occupation, or from engaging in any business for remuneration or profit,** provided such disability occurred after the insurance under this policy took effect and before the anniversary of the policy on which the insured's age at nearest birthday is sixty. Upon receipt at the Company's home office, before default in payment of premium, of due proof that the insured is totally disabled as above defined, and will be continuously so totally disabled for life, or if the proof submitted is not conclusive as to the permanency of such disability, but establishes that the insured is, and for a period of not less than three consecutive months immediately preceding receipt of proof has been, totally disabled as above defined, the following benefits will be granted:
>
> * * * * * * *
>
> "Before making any income payment or waiving any premium the Company may demand due proof of the continuance of total disability, but such proof will not be required oftener than once a year after such disability has continued for two full years. Upon failure to furnsh such proof, **or if the insured performs**

any work, or follows any occupation, or engages in any business for remuneration or profit, no further income payments shall be made nor premiums waived." (Emphasis ours.)

In the applications for the policies, Petitioner stated that his occupation was that of a "farmer" and "farming." In response to the words, "State exact duties in full," Petitioner stated in two of the policies, "Owns and operates grain and stock farm," and in the remaining two, "Owner and manager general farm" (Tr. 23, 24).

EVIDENCE ON QUESTION OF DISABILITY.

Evidence on the question of disability consisted of testimony preserved in the printed transcripts of the cases tried in Buchanan and Davies Counties, Missouri, and appealed to the Kansas City Court of Appeals, with the exception of the deposition of Petitioner and the oral testimony of Dr. Ryan offered by Petitioner. Testimony so offered under stipulation (Tr. 19, 20) was that of Petitioner, his brother, L. C. Stoner, his physician, Dr. J. A. Gray, and physicians Dr. Gregg Thompson and Dr. Charles Settles. The latter two testified for the Respondent.

The physical condition of Petitioner at the time of the trial and during the period involved in this action was fairly summed up from all the evidence by the trial court as follows (Tr. 97, 98):

> "We observed the defendant carefully. He walked into the court room, using a cane, but with only a slight limp, and with no expressions of pain. He appeared to be a strong, vigorous, healthy man, whose manner, features and appearance suggested intelligence above that of the average farmer. We have considered all of the testimony with the aid of this personal, visual, greatly significant observation.

> "The whole truth of the matter is that as a result of his injury the defendant has a permanently stiffened ankle; that any extensive use of that ankle is now painful, so that it cannot be extensively used both because of the pain and because of the stiffness; that medical and surgical treatment possibly would remove entirely the pain element in the defendant's ankle condition. The only business in which the defendant has had training and experience is that of farming. He is not physically able, because of his injury and its consequences, to perform those farmer's tasks which require the more or less continuous and full use of both feet. That is the extent of his handicap."

Since 1934 Petitioner has received no treatment for his injury. (Tr. 52).

The pain which he suffers on walking, he testified, "isn't pain that you can't stand, it's just a pain that bothers you."

Petitioner, age 42 at the time of the trial, had been a farmer all of his life, had a country grammar school education and had no experience or training in any other work except that of farming (Tr. 24). At the time of his injury in 1931 Petitioner lived upon what was known as the Estate Farm, consisting of about 200 acres. Petitioner's mother owned this farm during her life and rented it to Petitioner under an agreement whereby, out of the annual income of the farm, operating expenses, taxes and insurance were paid, then Petitioner and his mother were paid the living expenses of each and the profits remaining divided between them (Tr. 26-31, 48, 49).

Since September, 1933, and during the period covered by this suit, Petitioner has earned his livelihood out of the farming of the Estate Farm, and in addition has made profits which he has divided with his mother. Petitioner's livelihood was earned in consideration of the services rendered in the operation of the farm (Tr. 48). Petitioner

says he manages the farm for himself as tenant under a business-like arrangement just as if it were rented from another (Tr. 47, 48). He has continued in charge of the operation of the Estate Farm since his injury, and during the period involved in this suit.

In addition to the Estate Farm, Petitioner has operated, in connection with the Estate Farm, a 105-acre farm adjacent to the Estate Farm and owned by him (Tr. 26, 31).

At the time of his injury Petitioner was interested in two other farms, one of which he owned jointly with his brother and the other he owned jointly with his mother. He leased to his brother his interest in the farm they owned together, until 1935, when he sold his interest to his brother (Tr. 30). Prior to his injury Petitioner had charge of the leasing and handling of the farm owned with his mother, sanctioning the manner of its farming, making settlements, authorizing repairs and collecting the rentals. He continued to handle this farm in the same manner after his injury until 1936, when he and his mother sold that farm (Tr. 30).

The Estate Farm, which Petitioner is now operating, and upon which he is now living, was operated by him as a grain and stock farm prior to his injury. He bought live stock (cattle and hogs) from others, fed the produce of the farm to them, and sold the live stock for profit. Since his injury Petitioner has continued to operate the Estate Farm as a grain and stock farm, buying live stock and feeding them the feed raised on the farm, and selling them for profit (Tr. 32). Prior to his injury Petitioner had two men regularly employed on the Estate Farm, but since his injury has had only one man regularly employed. This, he says, resulted from the displacement of horses and mules with a tractor and more modern farming machinery. Both before and after his injury additional help was called in during rush seasons (Tr. 32).

Prior to his injury Petitioner assisted his hired men at times in performing the manual labor on the farm, assisted with the chores, preparation of the ground, plowing, feeding stock, sowing, scooping grain, operating mowing machines, planters, binders and the harrow. Since his injury he has been unable to do any of the physical labor, and it has been done by his hired man without Petitioner's physical assistance, but under his direction and supervision (Tr. 26-28). Prior to Petitioner's injury the hired man, Amphor, was charged with the responsibility of looking after the operations on the farm, with the help of Petitioner. Since the injury Amphor has continued to be responsible for the operation of the farm the same as before except for Petitioner's physical assistance (Tr. 32, 33). In this connection Amphor is the only hired hand remaining, and he is furnished a place to live and a garden and paid $9.00 a week (Tr. 34). Prior to his injury Petitioner depended, in the operation of the Estate Farm, upon Amphor, whom he called his "right-hand man," and since his injury has continued to depend upon him in those operations (Tr. 33).

With reference to management and operation of the farm, Petitioner, since his injury, has continued to feed cattle and hogs and sell them just as before his injury, for the purpose of making a livelihood out of the farm. Since his injury he has continued to attend personally to the purchase of live stock in Omaha and St. Joseph, and to the sale of the stock after feeding them (Tr. 34-35). He has driven his car to Omaha to the stockyards, and St. Joseph, distances of 90 to 100 miles, and has traded and sold stock on the markets in Omaha and St. Joseph (Tr. 36-37). He has continued to observe the live stock on the farm, looking after and keeping himself informed and acquainted with the stock (Tr. 37). Since his injury he has gone out in the alfalfa fields, consulted with his man about weather

conditions and the cutting of the alfalfa, and has driven his car out in the field to look after the crops. He can drive his car wherever a binder or a mowing machine can go (Tr. 37-38). Both prior and since his injury, extra labor in season has been hired, contracted with and paid personally by Petitioner. Prior and since his injury Petitioner has planned the planting and rotation of crops and method of operating the farm and the buying of live stock and the making of deals to secure stock to feed, all personally (Tr. 38-39). He has bought stock at both Omaha and St. Joseph, and from neighbors (Tr. 39). He has followed the same general practice since his injury as before in determining when cattle were ready for the market, has determined when and how they should be shipped. Prior to his injury he directed the feedings of the hogs, the manner of their feeding and what they should be fed and helped feed them. Since his injury he has continued to direct the feeding of the hogs (Tr. 39-40). He has continued since his injury, as before, to make the plans and give the orders with reference to the buying and raising of cattle on the farm. In the spring, when it comes time to plow, the work has to be managed and supervised and Petitioner has attended to the direction of the plowing himself (Tr. 40). Since his injury he has continued, as before, to make the arrangements and hire the trucks to haul the stock to market, and he can drive as far as the market himself (Tr. 40-41). Since his injury he has continued, as before, to buy the seed and determine the character of the seed to be sown. Such stock as has been sold locally since his injury has been sold by Petitioner, who carries on the negotiations and consummates the sales personally. Since the injury Petitioner hires a man to assist Amphor in doing the physical work which Petitioner formerly did, but it has not been necessary to have him there all the time, there having been only one man regularly employed (Tr. 43-44).

When the stock is shipped to the St. Joseph or Omaha markets by truck, Petitioner goes to market with them, riding in the truck, driving his own car or going with someone else (Tr. 44). He trades with the same commission house as before (Tr. 45).

There is nothing the matter with Petitioner's right leg, left knee, left thigh, internal organs, spine, hips, back, ribs, heart, stomach, left hand, left wrist, left upper arm, left elbow, left shoulder, right shoulder, right upper arm, right forearm, right hand, right wrist, neck, head, eyes, throat or mind (Tr. 54-55, 30).

Petitioner's brother corroborated Petitioner's testimony as far as he had knowledge (Tr. 54-56). Petitioner testified by deposition that his condition has continued the same as it was when he testified in the Davies County trial at Gallatin, Missouri, except that his left leg has gotten smaller. The medical testimony of both Petitioner and Respondent generally corroborated findings of the trial court with reference to the physical condition of the Petitioner at the time of the trial. The Respondent requested conclusions of law I and II, and the request for special findings of fact I, II, III, IV, V, VI and VII (Tr. 92-93); all were denied by the trial court and exceptions allowed.

FACTS FOUND BY THE COURT OF APPEALS.

In reversing the judgment of the District Court, the Circuit Court of Appeals accepted the facts with reference to Petitioner's condition as found and set out by the trial court in its memorandum and findings (Tr. 106-107). Without exhaustively reviewing the evidence the Circuit Court of Appeals, in the opinion of Judge Dewey, outlined the activities of the insured in the conduct of his business as reflected by the undisputed evidence (Tr. 108-109). These facts were an amplification of the facts specifically found by the District Court and were in no way contrary thereto.

Nor were the facts set out in Judge Dewey's opinion in dispute; in fact, they were all gleaned directly from the testimony of the insured himself. About them there is no doubt. Judge Van Valkenburgh, in his concurring opinion (Tr. 124), correctly stated that there was no room for disagreement as to the weight of the evidence in respect to the facts which form the basis of the majority opinion.

In his dissenting opinion Judge Thomas made some statements of facts, not found by the trial court and not supported by the record but actually in conflict with both the undisputed record and the findings of the trial court (Tr. 119).

ARGUMENT.

SUMMARY OF RESPONDENT'S ARGUMENT.

It is the position of the respondent in this case—

That the judgment of the Circuit Court of Appeals is not in conflict with the law of Missouri;

That the opinions of the Kansas City Court of Appeals in the companion cases do not conflict with the judgment of the Circuit Court of Appeals;

That the conclusion of the Circuit Court of Appeals is in harmony with the law as announced by the Supreme Court of Missouri;

That the conclusion reached by the Circuit Court of Appeals is in harmony with the opinions of the three Missouri Courts of Appeals;

That if the opinions of the Kansas City Court of Appeals are construed to be in conflict with the conclusion of the Circuit Court of Appeals, the opinions of the Kansas City Court of Appeals are then in conflict with the opinions of the Springfield Court of Appeals and the St. Louis Court of Appeals and the Supreme Court of Missouri, and do not represent the law of the State of Missouri.

With respect to the alleged duty of the Circuit Court of Appeals to consider itself bound by the Kansas City Court of Appeals, the respondent submits (1) that the Circuit Court of Appeals in applying the law of Missouri is not bound by any particular opinion of any Missouri Court of Appeals, but should give an opinion of a Missouri Court of Appeals only such weight as it would receive in other courts of its state and only such weight as it would receive as a determination of the law by the Supreme Court of Missouri; (2) that where there are conflicting opinions be-

tween the Courts of Appeals of Missouri, the Federal Courts must exercise their best judgment to determine which view will ultimately prevail when the matter is passed upon by the Court of last resort, the Supreme Court of Missouri; (3) that even where there are no conflicting opinions of the other Courts of Appeals the Federal Courts are not duty bound to follow an opinion of the Kansas City Court of Appeals but may and should evaluate that opinion in the light of the decisions of the Supreme Court of Missouri and try to determine what the Supreme Court of Missouri will say when the precise question is presented; (4) that opinions of the Supreme Court of Missouri prevail over opinions of the Courts of Appeals in conflict therewith.

Believing that the judgment of the Circuit Court of Appeals must be affirmed under the Missouri cases relied upon by Petitioner, Respondent submits that there is not involved in this case any conflict with or disregard of the controlling opinion of any Missouri court. Under no conception of the law of Missouri can the conclusion of law announced by the District Court, and sought to be upheld by Petitioner, be justified. With the specific facts found by the District Court Respondent not only has no quarrel, but bases its right to relief thereon. Of course, the ultimate conclusion of the District Court on the mixed question of law and fact (that of total and permanent disability) is not accepted because of the District Court's misconception of the law which resulted in the erroneous ultimate declaratory judgment (Tr. 100).

With respect to the ground stated in the petition for the writ of certiorari that an amount sufficient to give the District Court jurisdiction is not involved, Respondent submits that there is no merit to this assignment. Over $3,000.00 in disability benefits by way of monthly income and premium waivers were directly involved. In fact,

judgment was rendered therefor (Tr. 100), and this is recognized in the petition for the writ (II, p. 13).

I.

The judgment of the Circuit Court of Appeals under review, construing and applying the law of Missouri, is not in conflict with the law as declared by the Kansas City Court of Appeals in the companion cases. Stoner v. New York Life Insurance Company (Mo. App.), 90 S. W. (2d) 784; Stoner v. New York Life Insurance Company, 232 Mo. App. 1048, 114 S. W. (2d) 167.

If the Circuit Court of Appeals in the judgment under review has rendered a decision that is in harmony with the opinions of the Kansas City Court of Appeals in the companion cases, there is no occasion to determine the weight which must be given opinions of Missouri intermediate appellate courts.

In this case Respondent submits that this opinion of the Circuit Court of Appeals is in harmony with the opinions of the Kansas City Court of Appeals.

In the first case, reported in 90 S. W. (2d) 784, the Kansas City Court of Appeals reversed a general verdict in favor of the respondent insurer because of error in the instructions to the jury. In that appeal it was held that the plaintiff made a submissible case, i. e., that a jury **might** find total and permanent disability on the evidence there presented. It did not hold that the jury **must** find total and permanent disability. It did not hold that a verdict for the defendant would be unjustified by the evidence.

In the second appeal of a companion case, the Kansas City Court of Appeals reversed a general verdict in favor of Petitioner, the insured (232 Mo. App. 1048, 114 S. W. [2d] 167). This reversal was caused by error in the instructions. On this appeal it was conclusively shown that

the Kansas City Court of Appeals thought that the evidence would justify a verdict **either way.** Otherwise it would have affirmed the verdict and judgment as being for the right party despite error in instructions.

From these opinions it clearly appears that the Kansas City Court of Appeals held that whether the ultimate findings should be in favor of the insured or the insurer **depends upon the specific facts found by the trier of the facts.**

In the case at bar the cause was tried before the District Court upon the waiver of a jury with the District Court sitting as the trier of the fact. And the District Court did not return to the Circuit Court of Appeals a general verdict such as a general jury verdict, but made specific and definite findings of fact. Would the Kansas City Court of Appeals hold that the insurer was not entitled to a judgment upon the specific facts found by the District Judge? We submit that the Kansas City Court of Appeals would, upon those specific findings of fact, find in favor of the insurer. If so, this case does not deserve further consideration by this Court, and the judgment of the Circuit Court of Appeals should be affirmed.

The Kansas City Court of Appeals would come to the same conclusion as the Circuit Court of Appeals upon the facts found by the District Court.

It is evident from the opinion of the Kansas City Court of Appeals on the last appeal of a companion case that the insured petitioner could not recover if he could conduct his business and engage in his occupation by doing things other than farm labor. The record and the facts as found by the District Court and the Circuit Court of Appeals leave no doubt that the insured was engaging in his occupation and business by doing things other than physical labor. In fact, he so testified himself. And he was not

only earning a living as a result of his operation of the rented farms and his own labor, but he was making a profit in addition, which he divided with his landlord under contract.

Under the following language of the Kansas City Court of Appeals on the last appeal, it seems clear that the Kansas City Court of Appeals would have denied recovery itself upon the facts found by the District Judge (Stoner v. New York Life Insurance Company, 232 Mo. App. 1048, 114 S. W. [2d] 167):

> "We further held, 90 S. W. (2d) 784, loc. cit. 797, That the conceded inability of plaintiff to perform labor, which was part of his substantial duties, would not justify, as a matter of law, a verdict for the plaintiff; that plaintiff would not be entitled to recover, notwithstanding he could not perform farm labor by reason of his injuries, if he nevertheless had the ability to substantially perform his occupation by discharging duties other than farm labor."

This conclusion was compelled by the decision of the Supreme Court of Missouri in **Heald v. Aetna Life Insurance Company**, 340 Mo. 1143, 104 S. W. (2d) 379, as noted by the Kansas City Court of Appeals, 114 S. W. (2d), l. c. 172.

The supposed conflict between the ruling of the Circuit Court of Appeals and the Kansas City Court of Appeals does not exist.

II.

The opinion of the Circuit Court of Appeals is in harmony with the decisions of Missouri's highest court, its Supreme Court.

The Petitioner seems to contend in this case that, having established by the testimony that he is unable to do heavy

farm labor, he is totally disabled despite the fact that he is engaged in a lucrative business, earning a livelihood and a profit in addition, by performing duties other than heavy farm labor. This could be true only upon the theory that an insured is totally disabled where he is incapacitated from performing **any** substantial part of his ordinary duties. This is the view taken in the case of **Young v. Travelers Ins. Co.**, 80 Maine 244, l. c. 247, 13 Atl. 896. The principle therein expressed was injected into the opinion in **James v. United States Casualty Co.**, 113 Mo. App. 622. Thereafter it was accepted in **Katz v. Union Central Life Ins. Co.**, 226 Mo. App. 618, 44 S. W. (2d) 250, l. c. 252. The principle was reiterated and recognized in **Buis v. Prudential Ins. Co.**, 229 Mo. App. 190, 77 S. W. (2d) 127.

Finally, however, this whole line of authority was repudiated by the Supreme Court of Missouri in **Heald v. Aetna Life Ins. Co.**, 340 Mo. 1143, 104 S. W. (2d) 379, l. c. 384. There the Supreme Court of Missouri said:

> "In Katz v. Union Central Life Ins. Co., 226 Mo. App. 618, 44 S. W. (2d) 250, 252, the gist of the decision was expressed as follows: 'Applying these general rules of construction' (citing Corpus Juris), the court held, 'it was a question for the jury to decide whether or not plaintiff had become, and still was, incapacitated from performing **any** substantial part of his ordinary duties, thereby presenting a case of total disability, even though he was still able to perform a few minor duties.' (Our emphasis.)
>
> "The case of Buis v. Prudential Ins. Co., 229 Mo. App. 190, 77 S. W. (2d) 127, in so far as pertinent here, was ruled upon the authority of the Katz Case and under identically the same definitive rule as applied therein. So in that respect both of those cases are in the same category. We are of opinion that those cases were correctly decided on the facts, but we think that the governing principle or rule was incorrectly stated. It is not in harmony with the other decisions reviewed

herein, or any other Missouri decision so far as we are advised. That expression of principle is found in Young v. Travelers' Ins. Co., 80 Me. 244, l. c. 247, 13 A. 896, a leading case but not widely followed in other jurisdictions in that respect. Nor did the James Case follow it, as has been seen above, though it cited the same. Moreover, the author of the Bellows opinion, after discussing the Young Case, expressly declined to so interpret it and to follow it. So it is well for the plaintiff, whose counsel have argued in support of that incorrect statement of the law, that his case was not predicated upon it in the instructions given."

These repudiated cases are cited indiscriminately by Judge Thomas in his dissenting opinion.

There is nothing in the opinion of the Circuit Court of Appeals in the case at bar which is in conflict with the ruling of the Supreme Court of Missouri in the **Heald** case, supra. On the other hand, if it should be held that the insured was totally disabled simply because he is found to be unable to perform **one** of his substantial duties (heavy farm labor), that opinion would be in conflict with the ruling of the Supreme Court of Missouri in the **Heald** case. The **Heald** case passes upon the issue involved here and precludes recovery by the Petitioner.

He was actually engaged in the business of farming and the work of farming for profit under circumstances disentitling him to benefits under the provision of the contract that "if the insured performs any work, or follows any occupation, or engages in any business for remuneration or profit, no further income payments shall be made nor premiums waived."

In addition to the provision defining total and permanent disability which entitle the Appellee to disability benefits and waiver of premium, all of the policies in question contain this further provision (Tr. 23):

"Before making any income payment or waiving any premium the Company may demand due proof of the continuance of total disability, but such proof will not be required oftener than once a year after such disability has continued for two full years. Upon failure to furnish such proof, **or if the insured performs any work, or follows any occupation, or engages in any business for remuneration or profit,** no further income payments shall be made nor premiums waived." (Emphasis ours.)

In view of the testimony in which he expressly stated that he had, since the injury, continued the operation and management of the Estate Farm in the same manner as before the injury, except that he was unable to do any manual labor himself, Respondent was entitled to discontinue income payments under the provisions hereinabove mentioned.

These provisions of the policies relate not to disability but to conduct. It is a provision separate and apart from the disability provision of the contract. It is to be noted that under the disability provisions, which is found in the first part of the policy (Tr. 22-24), the insured is entitled to income payments upon being disabled as therein defined. These policies contain a further provision relating to the conduct of assured and unconcerned with disability. By this provision it is provided that regardless of his physical ability to do so, if the insured performs any work or follows any occupation or engages in any business for remuneration or profit, no further income payments shall be made nor premiums waived. In order to be entitled to any disability benefits under these policies, the Petitioner must not only qualify under the disability provisions of the policies, but also under this provision, and if he does any of the things enumerated, then under the plain, concise and unequivocal wording of the contract he is not entitled

to the benefits provided. It is the position of Respondent that Petitioner by his conduct in the performing of work, which he in his evidence detailed that he was performing, authorized the discontinuance of further income payments under the above provisions of the policies providing that if he perform any work, follow any occupation or engage in any business, no further income payments shall be made.

Respondent submits that this requirement is reasonable and is not in conflict with any part of the policy and therefore should be enforced. Equally stringent provisions have been held valid in disability income policies requiring continuous confinement. **State ex rel. Commonwealth Casualty Co. v. Cox,** 322 Mo. 38, 14 S. W. (2d) 600.

It has further been held that unambiguous language in insurance policies must be given its plain meaning and be enforced as written even when considering restrictive provisions of the policy. **State ex rel. Prudential Life Ins. Co. v. Shain** (Mo. Sup.), 127 S. W. (2d) 675.

In this case we submit that the language is clear to the effect that if the insured actually did any work, engaged in any business or occupation for profit, that he is not entitled to further income payments. His own testimony is equally clear that during the time in question he did actually engage in an occupation or business for profit. It is submitted that Petitioner has brought himself within the above-quoted provision of this contract and relieved the Respondent of the duty to make any further payments.

This question was raised and passed upon by the Kansas City Court of Appeals, **Stoner v. New York Life Insurance Company** (Mo. App.), 90 S. W. (2d) 784, and the Court of Appeals held that the construction given it should be the same as that given the insuring clause, that it is therefore meaningless. There the Kansas City Court of Appeals said (l. c. 793):

"In other words, the insuring clause gives the right to benefits when insured is disabled so as to prevent the doing of certain things. The last clause but negatives his right to benefits when he is not so prevented, but when he is able so to engage and does so engage. They are correlative clauses. Both are to be given the same construction."

It is true that an application for certiorari was denied in this case by the Supreme Court of Missouri. However, denial of the application does not denote affirmance of the opinion. The application was made in order to preserve the objections to this ruling so that it might not become the law of the case. Certiorari, except in exceptional cases, will not lie to the Supreme Court of Missouri until final judgment is entered. Since there was no final judgment, and since no identical case had been passed upon by the Supreme Court, there was ample grounds for the denial of the writ without affirmance of the opinion. Applying the rule of the case of **State ex rel. Prudential Life Ins. Co. v. Shain**, supra, the conclusion must be reached that Judge Reynolds of the Court of Appeals did violence to this contract by so construing it, as he did, to the contract under review in the **Prudential Case.**

III.

The opinion of the Circuit Court of Appeals follows the law of Missouri as declared by the St. Louis Court of Appeals and the Springfield Court of Appeals, courts of equal rank with the Kansas City Court of Appeals.

Upon the specific facts found by the trial court, a proper application of the law of Missouri as declared by the St. Louis and Springfield Courts of Appeals requires a finding in favor of the Respondent. Assuming that there is no decision of the Supreme Court of Missouri upon the matter decided by the Circuit Court of Appeals, we submit

that the holdings of two Courts of Appeals of Missouri are contrary to the Petitioner's construction of the Missouri law. The Springfield Court of Appeals and the St. Louis Court of Appeals have declared the law of Missouri to be in accord with the judgment of the Circuit Court of Appeals. If two of the three Courts of Appeals of the state support the conclusion of the Circuit Court of Appeals, there can certainly be no federal rule requiring that the Circuit Court of Appeals follow the third Missouri Court of Appeals.

SPRINGFIELD COURT OF APPEALS.

Jones v. Metropolitan Life Insurance Company (1939) (Mo. App.), 130 S. W. (2d) 967.

This was an action upon the disability clause of a group insurance policy. The policy provided for disability benefits upon proof that the insured "has become totally and permanently disabled as a result of bodily injury or disease so as to be prevented thereby from engaging in any occupation or performing any work for compensation or profit."

The insured secured a verdict and judgment below. On appeal the insurer questioned the sufficiency of evidence to make a case for the jury. The Springfield Court of Appeals reversed the judgment outright, holding there was not sufficient evidence to make a case for the jury. The holding was based upon the ground that the uncontradicted evidence was that plaintiff did work whether he felt like it or not for two years preceding the trial. This was said to be "proof absolute that he was not physically and permanently incapacitated to work."

In so holding the Springfield Court of Appeals said:

> "The evidence shows that the plaintiff worked at various employments from the time he quit the employment for the Lead Company up to the time of the trial of this case in the circuit court. He testified that

he worked several months for the W. P. A. There was a record of the time he put in work for the W. P. A., introduced in evidence, showing the dates he worked, the number of hours, and the amount he received for such work. This uncontradicted record shows that he commenced work there on December 11, 1935, and continued to work every week up to April 7, 1938, just eight days before the trial in this case was had. This record shows that he worked from 48 hours to 64 hours each two weeks throughout the time from December 11, 1935, to April 11, 1938, and that he received wages for such work ranging from 36 cents per hour to 48 cents per hour, and this without any testimony that he was unable to do the work. **There was some evidence that he was not strong physically, but there was no evidence of any kind that he was totally disabled, either before or after he quit work for the Lead Company. In fact, the uncontradicted evidence all shows that he did work, whether he felt like it or not, and the very fact that he did work throughout the entire time, and that he worked regularly for the entire two years immediately preceding the trial, is proof absolute that he was not physically and permanently incapacitated to work.** And under the expressed terms of the policy incapacity to work, or total and permanent disability, must be shown by competent evidence before the insurance company is liable. Smith v. Metropolitan Life Ins. Co., Mo. App., 108 S. W (2d) 995." (Emphasis ours.)

Under the ruling of the Springfield Court of Appeals, the insured, Stoner, in the case at bar was shown by "proof absolute" not to be totally disabled.

ST. LOUIS COURT OF APPEALS.

Smith v. Metropolitan Life Insurance Company (1937) (Mo. App.), 108 S. W. (2d) 995.

This was an action to recover total disability benefits upon a policy providing therefor upon proof that the insured "has become totally and permanently disabled as a result of bodily injury or disease so as to be prevented thereby from engaging in any occupation or performing any work for compensation or profit."

The plaintiff secured a verdict and judgment of a jury. On appeal, the sufficiency of evidence to make a case was questioned. The Court of Appeals reversed the judgment of the trial court outright, holding that the evidence did not make a submissible case of total disability. This holding was based upon the ground that the evidence showed that the insured worked at his usual employment during the period for which disability was sought. In so holding, the Court of Appeals said:

> "Ignoring defendant's evidence and taking into consideration only the evidence adduced on behalf of plaintiff as well as plaintiff's own testimony, it clearly appears that plaintiff worked at his usual employment in the usual and customary way not only prior to March 31, 1932, but also during April, May, and the early part of June, 1932, after the policy sued on was canceled. It appears without dispute that he was not only able to do this but that he worked overtime both before and after the date of the cancellation of the policy sued on.
>
> "The cases cited above show that the appellate courts of this state have given to policies of insurance containing disability clauses similar to the one involved herein a broad and liberal construction and have affirmed judgments in favor of insured employees,

notwithstanding evidence showing that the employee did some work during the periods covered by such policies. **An examination of all such cases, however, discloses that in every instance where a judgment for a claimant was affirmed there was evidence in the case from which it could be reasonably inferred that the employee was able to perform his work only by virtue of the assistance of others or by the exercise of extreme, extraordinary, and painful efforts involving grave risks of health and life. We have no such testimony in this case.** The testimony of the doctors concerning the condition which they found plaintiff to be in during June and July, 1932, after the policy herein had been canceled and after the severe attack of typhoid fever which plaintiff suffered at that time, does not relate to plaintiff's condition on and prior to March 31, 1932, while the policy herein was in force and effect. It will be noted that plaintiff's own family physician made a physical examination of plaintiff on June 6, 1932, 'which disclosed typhoid fever, nothing else.' The doctor testified that he went to see plaintiff regularly from the 6th of June to the 25th of July, 1932, and stated: 'I don't remember what was wrong with him prior to that time.' He stated that he did not examine plaintiff's muscles at that time and said further: 'I have no record of any severe illness prior to this typhoid.'" (Emphasis ours.)

In the motion for rehearing, counsel for the insured asserted that the opinion represented a departure from the liberal rule announced and applied previously by the courts of Missouri. The Court of Appeals denied that there had been a departure from the rule of liberal construction. On motion for rehearing the Court said (l. c. 1000):

"There has been no departure in the opinion by this court from the rule of liberal construction. This court is in hearty accord with the rule as evidenced by its

many decisions heretofore referred to, but, as stated in the original opinion herein, we are not permitted to indulge in conjecture and guess to apply it in a case where the evidence does not show that the claimant was totally and permanently disabled during the period covered by the policy sued on. The motion for rehearing is therefore overruled."

Eden v. Metropolitan Life Insurance Company (1940) (Mo. App.), 138 S. W. (2d) 745.

This is an action upon the total and permanent disability clause of a group insurance policy. The disability clause provided for benefits upon proof that the insured "had become totally and permanently disabled as a result of bodily injury or disease so as to be prevented thereby from engaging in any occupation or performing any work for compensation or profit." The plaintiff recovered and, on appeal, defendant questioned the sufficiency of the plaintiff's evidence to make a submissible case.

The St. Louis Court of Appeals reversed the judgment of the trial court, holding the evidence insufficient to make a case of total disability. It held that the evidence showed that the insured was able to and did work with such proficiency as to be able to earn more than a basic rate of pay of his calling. In so holding the St. Louis Court of Appeals plainly announced the rule which would defeat recovery in this case (l. c. 748):

"We appreciate that for an insured to be totally disabled within the meaning of a disability clause such as the one upon which this action is based, he need not be absolutely helpless, but that it suffices if he shows the existence of an infirmity which renders him unable to perform, in the usual and customary way, substantially all of the material acts which are necessary to the prosecution, either of his own particular occupa-

tion, business or calling, or of any occupation, business or calling which his age, training, experience, education and physical condition would fit him for except for his disabling infirmity. Heald v. Aetna Life Insurance Company of Hartford, Conn., 340 Mo. 1143, 104 S. W. (2d) 379; Moss v. Metropolitan Life Insurance Co., 230 Mo. App. 70, 84 S. W. (2d) 395; Wright v. Metropolitan Life Insurance Co. (Mo. App.), 115 S. W. (2d) 102; Rogers v. Metropolitan Life Insurance Co. (Mo. App.), 122 S. W. (2d) 5.

"The trouble is that in this case, not only did plaintiff's own evidence show that during his employment by the lead company he was physically able to perform, in the usual and customary way, all the material acts of the job assigned to him, but that, indeed, he was so proficient at his work, and so able to do more than the minimum of work called for by the basic rate of pay, that he regularly earned substantial bonuses for himself, and likewise made it possible for regular bonuses to be earned by those of his fellow employees who hauled away the cars he filled.

"This is not the type of case we have so frequently had before us, where it was necessary that the insured employee be customarily aided in his work by his fellow employees, or where he was able to continue on the job only by supreme, extraordinary and painful effort, at the risk of endangering his life and health. On the contrary, plaintiff was paid the bonuses for extra work up to the very time of his injury in the explosion, and then failed to come back to the mines when, as shown by certain of his own evidence, he 'was released by the doctor to return to work on March 14, 1931,' after a layoff of only seventeen days. In other words, the injury to his eyes, however painful, was not totally disabling in any proper sense; and so little did it evidently affect his capacity for work that Dr. Vitale, who was plaintiff's only medical witness, made no mention of any such disability in the course of his testimony respecting the findings he had made.

"* * * We think the very most that could be said of any of his evidence would be that it showed the existence, during such period, of a partial disability in the sense of an impairment in some degree of the normal function of certain of the organs of his body, which may, on occasions, have caused him to lose some little time from his work; but to say that at that time he was totally and permanently disabled, even within the liberal construction to be given the disability clause of the policy, would be to go in the very face of his own evidence, which was directly to the contrary of any such conclusion.

"Under the facts of the case, defendant should have had its requested peremptory instruction at the close of all the evidence. Smith v. Metropolitan Life Insurance Co. (Mo. App.), 108 S. W. (2d) 995; Jones v. Metropolitan Life Insurance Co. (Mo. App.), 130 S. W. (2d) 967.

"It follows that the judgment rendered by the circuit court should be reversed and the Commissioner so recommends."

Respondent submits that the opinion of the Kansas City Court of Appeals in the last appeal of a companion case, 232 Mo. App. 1048, 114 S. W. (2d) 167, is not in conflict with the rule announced by the Springfield Court of Appeals and the St. Louis Court of Appeals. But if it is conceived to be in conflict with that rule, then the Circuit Court of Appeals was at perfect liberty to use its best judgment to determine which view would ultimately prevail.

We submit that this judgment was wisely exercised. And we consider it of no moment that the principal opinion of Judge Dewey expressly stated that none of the opinions of the Missouri Courts of Appeals were binding upon the Circuit Courts of Appeals.

IV.

The Circuit Court of Appeals was not bound to follow the opinions of the Kansas City Court of Appeals in the companion cases. The Kansas City Court of Appeals is not a court of last resort in any case. It is not a court of general territorial jurisdiction in Missouri. Its territorial jurisdiction is limited to one of three districts. Its judgments are of no higher authority than those of the Springfield Court of Appeals and the St. Louis Court of Appeals, co-ordinate courts exercising jurisdiction in different territories. All final judgments of any of the courts of appeals are reviewable by the Supreme Court of Missouri on certificate or by certiorari. Under the doctrine of the Erie case, the Federal Courts are not required to follow decisions of such a court.

We do not believe that the result reached by the Circuit Court of Appeals in the judgment under review is in conflict with the law as declared by the Kansas City Court of Appeals in the companion cases. Nevertheless, against the event that the court should so decide, we submit that the federal courts under the doctrine of the **Erie** case are not required to follow the opinions of the Kansas City Court of Appeals as declaratory of the state law. This is true especially where there are conflicting decisions from either of the courts of co-ordinate rank, namely, the Springfield Court of Appeals and the St. Louis Court of Appeals.

Whether any particular decisions of any particular intermediate appellate court of the state must be followed by the federal courts must depend upon several circumstances.

The first circumstance is the extent of jurisdiction of the intermediate appellate court involved. Any solution of the

question must take into consideration the territorial jurisdiction of the intermediate court.

The second circumstance to be considered is whether, under the organic law of the state creating the court in question, the intermediate appellate court is a court of last resort with the right to finally determine the matter involved.

The third circumstance is the state of the decisions of other appellate courts of the state, both co-ordinate and superior. Certainly if a conflict exists between intermediate appellate courts, the federal court must determine for itself which decision represents the law of the state. And if the opinion of the intermediate appellate court is in conflict with the decisions of the court of last resort, the intermediate appellate court should not be followed.

1. The place of the Kansas City Court of Appeals in the Missouri judicial system.

The Missouri judicial system (with immaterial exceptions) consists of the circuit courts, courts of original jurisdiction, the three intermediate appellate courts, of which the Kansas City Court of Appeals is one, and the Supreme Court of Missouri.

This system is provided for by the Constitution of 1875 and Amendments thereto. **Circuit Courts**, Article VI, Secs. 22 to 30, inclusive; **Courts of Appeals**, Article VI, Secs. 12 to 17, inclusive; Article VI, Amendment of 1884, Secs. 1 to 11, inclusive; **Supreme Court**, Article VI, Secs. 2 to 11, inclusive; Article VI, Amendment of 1884, Secs. 6 to 8, inclusive; Article VI, Amendment of 1890, Secs. 1 to 5, inclusive.

The Constitution of 1875 provided for a Supreme Court (Article VI, Secs. 1 to 11, inclusive) and "an appellate court to be known as the 'St. Louis Court of Appeals.'" (Article VI, Sec. 12.)

The jurisdiction of the St. Louis Court of Appeals was coextensive of the City of St. Louis and the four neighboring counties of St. Louis, St. Charles, Lincoln and Warren. In certain cases only did the appeal or writ of error lie from the St. Louis Court of Appeals to the Supreme Court (Article VI, Sec. 12). However, in the Constitution of 1875 the Supreme Court was given "general superintending control over all inferior courts." And in this connection was given power to issue writs of habeas corpus, mandamus, quo warranto, certiorari and other original remedial writs (Article VI, Sec. 3). In the Amendment of 1884 to Article VI the jurisdiction of the St. Louis Court of Appeals was extended to include fifty-five more counties (Sec. 1). In the same Amendment the Kansas City Court of Appeals was created and its jurisdiction made coextensive with all the counties in Missouri except those within the jurisdiction of the St. Louis Court of Appeals (Sec. 2). In the same Amendment the Legislature of Missouri was given the power by law to create an additional court of appeals. The Springfield Court of Appeals was established by legislative act in 1909 and its territorial jurisdiction defined (Sec. 1907, R. S. Mo. 1929). By appropriate legislative act, the territorial jurisdiction of the St. Louis and Kansas City Courts of Appeals were reduced to permit the establishment of the Springfield Court of Appeals (Secs. 1889, 1897, R. S. Mo. 1929). These three Courts of Appeals now exist.

In the amendment to Article VI of 1884 jurisdiction in matters appealable to the Supreme Court was denied to the courts of appeals (Sec. 5). And the Supreme Court was expressly given "superintending control of the courts of appeals by mandamus, prohibition and certiorari" (Sec. 8), and it was provided that the last previous ruling of the Supreme Court on any question should in all cases be controlling authority in the courts of appeals (Sec. 6).

The judges of the courts of appeals were charged with the duty of certifying to the Supreme Court any case in which its decision is deemed by any one of the judges to be contrary to any previous decision of any one of the courts of appeals or of the Supreme Court (Sec. 6).

The Supreme Court is the court of last resort. It exercises "superintending control" over the judgments of the courts of appeals by mandamus, prohibition and certiorari. **Mandamus**, State ex rel. City of Stanberry v. Smith, 172 Mo. 618; **Prohibition**, M. K. & T. Ry. Co. v. Smith, 154 Mo. 300; **Certiorari**, State ex rel. Gilman v. Robertson, 264 Mo. 661. It hears certified cases as if originally appealed to it. Berry v. Equitable Fire and Marine Ins. Co., 317 Mo. 1119, 298 S. W. 63.

Only where the judgment has become final will the writ of certiorari lie from a superior to an inferior court. **State ex rel. Duraflor Products Co. v. Pearcy**, 325 Mo. 335, 29 S. W. (2d) 83. Undoubtedly, this is the reason that certiorari was denied when sought by the respondent to review the opinion of the Kansas City Court of Appeals in **Stoner v. New York Life Insurance Company** (Mo. App.), 90 S. W. (2d) 784. The denial of the petition for certiorari in that case is not an approval of the judgment sought to be reviewed. In the Supreme Court of Missouri, as in this court, denial of a petition for certiorari does not denote affirmance. **State ex rel. Duraflor Products Company v. Pearcy**, 325 Mo. 335, 29 S. W. (2d) 83.

The application to review the opinion of the Kansas City Court of Appeals was premature, because no final judgment had been entered. The Court of Appeals had only remanded the cause for a new trial. **State ex rel. Duraflor Products Co. v. Pearcy**, supra. What the Supreme Court of Missouri would say about the ruling of the Kansas City Court of Appeals in the first **Stoner** case, when and if the soundness of that decision is ever prop-

erly presented for determination, is a matter of conjecture. In any event, the opinions of the Kansas City Court of Appeals do not constitute rulings by the highest court of Missouri nor do they constitute authoritative determinations of the law of Missouri per se. Opinions of the Kansas City Court of Appeals are not binding upon the federal courts for these reasons:

(1) The Kansas City Court of Appeals is a court of limited territorial jurisdiction within the state. Its jurisdiction is less than statewide.

(2) The Kansas City Court of Appeals is not a court of last resort. Its decisions are reviewable by the Supreme Court of Missouri on certificate and by certiorari, mandamus and prohibition.

(3) A decision of the Kansas City Court of Appeals may conflict with the decisions of a co-ordinate court of appeals serving a different territorial jurisdiction. If the opinion in the first **Stoner** case (90 S. W. [2d] 784) decided by the Kansas City Court of Appeals is subject to the construction placed upon it by Petitioners, it is certainly in conflict with the decisions of both the Springfield Court of Appeals and the St. Louis Court of Appeals. (See Point III hereof.)

(4) The Kansas City Court of Appeals is especially enjoined by the Constitution to follow the decisions of the Supreme Court of Missouri. Any judgment which it renders in conflict with the decisions of the Supreme Court of Missouri is held to be wholly in excess of its jurisdiction, void and subject to being quashed on petition for certiorari.

For these reasons we believe that an examination of the structure of the Missouri judicial system and the place of the Kansas City Court of Appeals therein leads to the con-

clusion that its decisions have no binding effect upon the federal courts as declarations of the law of the state. Of course, they should be given the persuasive effect to which their reasoning entitles them.

2. Petitioner's theory would deprive Respondent of its ultimate right to have the opinions of the Court of Appeals reviewed in the light of the decisions of the Supreme Court of Missouri.

As we understand it, liberally construed, the ultimate aim of the Court in adopting the rule of the **Erie** case was to secure in the Federal Courts, in cases passed on involving diversity of citizenship, application of the same law that would be applied in the State Court if the causes were tried there. Therefore, it is of importance that the Federal Courts refrain from adopting as **final** the decisions of any intermediate state court which is not considered final by the State Courts. For instance, in the case at bar, if **final** judgment should ever be rendered against the insurer in one of the companion cases by any of the Missouri Courts of Appeals, a right to test the correctness of that final judgment on application for certiorari to the Supreme Court of Missouri exists. (See **State ex rel. Prudential Life Insurance Company v. Shain**, 344 Mo. 623, 127 S. W. [2d] 309.) **So, in evaluating the weight which will be given to an opinion of the Missouri Court of Appeals, the Federal Court must consider that opinion in the light of the decisions of the Supreme Court of Missouri and the probable outcome of a petition for writ of certiorari calling into question a final judgment in the case.** To do otherwise would be to hold the parties bound in the Federal Court by a decision which might not bind them in the State Court.

There is no merit in the contention that the Supreme Court of Missouri reviewed the ruling of the Kansas City Court of Appeals in **Stoner v. New York Life Insurance**

Company, 90 S. W. (2d) 784, and denied the contentions of the Respondent.

The reason that there is no merit in this contention is because the statement is incorrect. (See Point V hereof.)

V.

There is no ruling by the Supreme Court of Missouri affirming the judgment of the Kansas City Court of Appeals in 90 S. W. (2d) 784.

Petitioner urges in point (d) (p. 10) of "Reasons Relied Upon for the Allowance of the Writ" that the Supreme Court of Missouri has held that this and like policies are ambiguous and subject to judicial construction, citing the cases of **State ex rel. New York Life Ins. Co. v. Shain; State ex rel. Metropolitan Life Ins. Co. v. Allen**, 337 Mo. 525, 85 S. W. (2d) 469; **State ex rel. Metropolitan Life Ins. Co. v. Hostetter**, 338 Mo. 589, 92 S. W. (2d) 122; **Bellows v. Travelers Ins. Co.** (Mo.), 203 S. W. 978.

It is urged that the Supreme Court of Missouri reviewed the ruling of the Kansas City Court of Appeals in **Stoner v. New York Life Ins. Co.**, 90 S. W. (2d) 784, and affirmed the holding of the Kansas City Court of Appeals that the policies here in question were ambiguous and subject to construction (Petitioner's Brief, page 29).

The Supreme Court of Missouri did not review the ruling of the Kansas City Court of Appeals in **Stoner v. New York Life Ins. Co.**, 90 S. W. (2d) 784. The respondent in this cause requested the Supreme Court of Missouri to review that decision by filing a petition for writ of certiorari in the Supreme Court of Missouri. The application for the writ was denied without comment, opinion or ruling on any issue involved in the case. There are many reasons why the Supreme Court of Missouri in

its discretion might have refused the writ. The application was premature, because no final judgment had been rendered, but the cause had simply been remanded by the Court of Appeals. **State ex rel. Duraflor Products Co. v. Pearcy**, 325 Mo. 335, 29 S. W. (2d) 83, l. c. 89.

Regardless of the reason prompting the Supreme Court of Missouri to deny the petition for certiorari and thereby to refuse to review the ruling of the Kansas City Court of Appeals, it is well settled that denial by the Supreme Court of Missouri of a petition for a writ of certiorari to review the opinion of an inferior court is not an affirmance of the judgment of the inferior court in any respect. **State ex rel. Duraflor Products Company v. Pearcy**, 325 Mo. 335, 29 S. W. (2d) 83. In that case, supra, the Supreme Court of Missouri said on this subject:

> "But above and beyond the objections just mentioned is the fact that a writ of certiorari is not a writ of right (as regards private suitors), and that the issuance thereof rests in a sound judicial discretion. State ex rel. v. Dobson, 135 Mo. 1, 19, 36 S. W. 238, 243; State ex rel. v. Terte, supra, 320 Mo., loc. cit. 472, 8 S. W. (2d), loc. cit. 19; State ex rel. v. Pfeffle, 220 Mo. App. 676, 682, 293 S. W. 512, 515. A refusal of the writ in the exercise of that discretion cannot be taken as an adjudication on the right of the party to have it or on the merits of the controversy, such as makes these questions res judicata. 11 C. J., Sec. 385, p. 213; People ex rel. v. City of Kingston, 101 N. Y. 82, 91, 4 N. E. 348" [29 S. W. (2d), l. c. 87].

Therefore the assertion by Petitioner that the Supreme Court of Missouri "ruled that the Kansas City Court of Appeals was right" is erroneous and a misconception of the legal effect of the denial of a petition for writ of certiorari.

VI.

Petitioner was not totally and permanently disabled during the period involved.

Upon waiver of a jury, it devolved upon the District Court to determine all issues of fact in accordance with the law and the preponderance or greater weight of the evidence. The question of total disability was such an issue. By circuitous reasoning, distinguished by novel legal conceptions and questionable play on words unrelated to any legal authority (and citing none), the District Court arrived at the conclusion that Respondent had not even made a submissible or prima facie case under the law (Tr. 99). There was, however, under this record, no occasion for the practice of hair-splitting logic. In attending to what were conceived to be the technical niceties of the case, the District Court overlooked or avoided the obvious.

The evidence and Petitioner's own testimony showed that Petitioner was able to and actually was engaged in the business of a grain and stock farmer for profit; that he earned his livelihood and made a profit in addition, as a result of his efforts in operating a rented farm under a business-like arrangement with the landlord.

Under these circumstances it was the duty of the District Court to find for Respondent and enter a declaratory judgment of nonliability for the period involved.

The Kansas City Court of Appeals, in rendering its opinion upon these very contracts and this same evidence, held that total disability was not proved as a matter of law, saying:

> **"We further held, 90 S. W. (2d) 784, loc. cit. 797, that the conceded inability of plaintiff to perform labor, which was part of his substantial duties, would**

not justify, as a matter of law, a verdict for the plaintiff; that plaintiff would not be entitled to recover, notwithstanding he could not perform farm labor by reason of his injuries, if he nevertheless had the ability to substantially perform his occupation by discharging duties other than farm labor. We expressed this thought in somewhat different language. See, 90 S. W. (2d) 784, loc. cit. 796, 797, where we said, 'Plaintiff is not to be denied benefits by reason of the provisions of said clause by reason of his conduct in undertaking to operate and manage his said farms and to direct farming operations thereon unless in such undertaking he is able to perform in a substantial way all of the material duties of his occupation as a farmer engaged in the actual operations which he is undertaking to perform.'

"Plaintiff, by his instruction No. 1, has failed to follow our ruling in the former appeal. The instruction fails to submit to the jury plaintiff's duties as a whole but attempts to separate those duties as between those involving farm labor and those involving the remainder of his occupation." (Emphasis ours.) Stoner v. New York Life Insurance Company (Mo. App.), 114 S. W. (2d) 167, l. c. 171-172.

This conclusion was compelled by the decision of the Supreme Court of Missouri in **Heald v. Aetna Life Insurance Company,** 340 Mo. 1143, 104 S. W. (2d) 379, as noted by the opinion of the Court of Appeals, at page 172.

Therefore, we submit that the evidence clearly preponderates in favor of a finding of the absence of total disability.

For the period covered by this suit, it was admitted by Petitioner that he has operated the leased Estate Farm in a manner such as to earn a livelihood for himself and the landlord and a profit in addition, doing everything that he did before his injury except manual labor. And it is admitted by Petitioner that during this time his

efforts have earned him a livelihood and a profit. In addition he has personally conducted the operation of the farm except for the manual labor. And it is admitted by Petitioner that the principal business of the farm is buying, feeding and selling live stock, which he does. And it is admitted by Petitioner that he has less assistance in the operation of the farm than before; that the introduction of modern farm machinery has obviated the necessity for his physical labor, and in addition has permitted him to release one regular employee. (If this is total disability, we wonder what would be partial disability within the meaning of a policy insuring against partial disability.)

Under the terms of the contract of insurance (Tr. 21-22), the insured is not entitled to disability benefits or waiver of premiums until he "is so disabled by bodily injury or disease that he is wholly prevented from performing any work, from following any occupation, or from engaging in any business for remuneration or profit * * *."

The trial court held that Petitioner was not insured against disability from following the occupation or business that he was engaged in at the time of the issuance of the policy, but that the word "any" must be given its reasonable and obvious meaning (Tr. 96). The court further held that the three essential elements constituting total disability are alternatives (Tr. 96), and if it is proved that the insured is not wholly prevented "from doing any work" or that he is not wholly prevented "from following any occupation" or that he is not wholly prevented "from engaging in business for remuneration or profit" then Respondent is under no liability (Tr. 96-97).

In a consideration of the question of whether or not Petitioner is totally disabled within the meaning of the policy it would seem unnecessary to attempt to distinguish between the phrases "from performing any work," "from following any occupation," and "from engaging in any

business." The trial court held and, we think properly, that the last phrase is the broadest. It must be admitted that if the insured is able to engage in any business for remuneration or profit he is not entitled to the benefits claimed under the policy. For the purpose of this review, therefore, it is sufficient to consider whether or not the activities of Petitioner as described in the record constitute "engaging in business for remuneration or profit."

It becomes necessary to first determine what is meant by the words "business" or "engaging in business."

1. **"Business Defined."**

"Business," as defined by the trial court is "any one of those vocations of livelihood whereby men have been accustomed to earn livelihood for themselves and their families." This is in accordance with the approved definition of the word. **Webster's New International Dictionary** defines business as "that which busies, or engages time, attention or labor as a principal serious concern or interest —any particular occupation or employment habitually engaged in, especially for livelihood or gain."

The following definition of the word is found in **12 C. J. S.**, page 765:

> "It has been said that while there are few words more current in our speech than the word 'business,' and few that include a greater variety of subjects, yet there is none which, in popular speech, has greater or more marked singleness in denotement, and that when one speaks of 'business,' the mind naturally contemplates a commercial or industrial establishment or enterprise.
>
> "In this narrower sense, or commercial use, it has been held that the word applies only to that in which one engages for the purpose of livelihood, profit, or the like, and hence is applicable to any particular

employment, occupation, or profession followed as a means of livelihood; that, as so commonly used, it has reference to, or implies, a regular and legal employment pursued for profit, and with a view to livelihood or some gain, it being said that these objects are necessarily implied when one's business is spoken of; also, that it includes all manner of occupations or means by which persons earn a livelihood, and every employment, occupation, profession, or trade; and in this sense the word has been defined, in general, as meaning calling, employment, profession, trade, or vocation."

In the case of **Plant v. Walsh**, 280 Fed. 722, it was held that a man having other sources of income who was operating a farm through an organization of experts and under the supervision of a comptroller, but who gave a considerable part of his personal time to bringing about efficiency and putting the farm on a paying basis, was engaged in the business of farming so that losses from his farming operations could be considered as business losses.

In **Washburn v. Commissioner of Internal Revenue**, 51 Fed. (2d) 949, it was held that a retired lawyer who was actively engaged in the management and operation of various corporations and enterprises in which he had invested his money was engaged in business.

In **Foss v. Commissioner of Internal Revenue**, 75 Fed. (2d) 326, it was also held that a man actively engaged in the management of various companies in which his funds were invested was engaged in business so that he might take deductions from attorney fees paid his personal counsel in litigation involving his rights in the operation of one of his various enterprises.

In the case of **Collins v. Truman** (Mo. App.), 14 S. W. (2d) 526, the court held that the use of a room as an

office for a Justice of the Peace was prohibited by a clause in a lease forbidding the use of the room for any business other than a restaurant, it being held by the court that the word "business" was broad enough to include the occupation of Justice of the Peace.

In **Pitts v. Maupin**, 230 Mo. App. 221, 88 S. W. (2d) 384, the court held that a man may have more than one business and in that case held Maupin had two businesses, one a seed business in the town of King City and the other a farming business in Nodaway County. While the opinion is not clear on the question, it appears therefrom that Maupin did not devote labor to the operation of his farm but devoted most of his time to the seed business in King City. Yet, the Missouri Court held that the operation of the farm constituted a business.

Under the foregoing definitions it is seen that the performance of manual labor, incident to the accomplishment of the business, is not necessary in order for one to be engaged in business. In ordinary usage "business" is considered as a combination of personal effort and capital. **Plant v. Walsh**, supra; **Washburn v. Commissioner of Internal Revenue**, supra, and **Foss v. Commissioner of Internal Revenue**, supra.

2. The activities of Petitioner as disclosed by the record show him engaged in business for remuneration or profit.

Petitioner's own evidence discloses that he is engaged in business for remuneration or profit. According to his testimony Petitioner lived on a farm of 200 acres referred to as the Estate Farm. His mother owned the life estate in this farm and Petitioner rented the farm from her under an agreement whereby he paid to her a certain part of the profits after taxes and expenses were paid. In addition he owned and operated in connection therewith a farm of 105

acres. Before and after the accident these farms were operated by Petitioner as grain and stock farms. He raised grain and stock and in addition to the stock raised by him purchased live stock for the purpose of fattening and resale. Prior to his accident, in the operation of his business he did a certain amount of manual labor incident to the planting and harvesting of his crops and the feeding of live stock. After the accident and during the period of time, in question in this suit, he operated the farms in exactly the same manner with the exception that he employed a man to do the manual labor which prior to his accident was done by him personally. No change was made in the agreement for the operation of the farm with his mother. After the accident he still devoted his entire time to the operation of these farms and to the buying and selling of live stock exactly as he had done prior to his injury, and from these operations made a livelihood and a profit to turn over to his mother. There is no testimony that he was unable to perform any of the duties which he did perform during the period in controversy, although there is testimony that he was unable during this period to perform the manual labor in connection with the operation of the farm which he had performed prior to his accident.

It is the position of Respondent that under these circumstances Petitioner was engaged in business during the period in controversy within the meaning of the use of that word in the provisions of the contract of insurance. He was engaged in activities which have been defined by lexicographers and courts as constituting a business.

The Federal Courts in passing upon the exemption in the fourth section of the bankruptcy act have had occasion to define what constitutes the occupation or business of farming. The courts have uniformly held that it is not

necessary for one to be engaged in the manual labor incident to farming in order to be engaged in the occupation or business of farming and, therefore, come within the exemption of the statute. In the case of **First National Bank & Trust Company of Bridgeport, Conn., v. Beach**, 301 U. S. 435, 441, 57 S. Ct. 801, 81 L. Ed. 1206, 86 Fed. 88, the Circuit Court of Appeals of the Second Circuit in passing upon what constitutes a farmer said (l. c. 89):

> "We reject the first alternative; a man is no less a farmer because he hires laborers, either regularly or sporadically; he is 'personally' engaged in farming, though, being in possession, he rides his acres and superintends the manual labors of others." (Certiorari was granted and this opinion was affirmed by the Supreme Court.)

In **Florida National Bank et al. v. Evans**, 28 Fed. (2d) 67, the court held that the provision exempting farmers from involuntary bankruptcy included persons operating farms through overseers and wage hands. The Court said (l. c. 72):

> "It is not necessary in this case to determine whether 'farming' and 'tillage of the soil' are synonymous, or whether the latter applies to any natural person engaged chiefly in doing manual labor on a farm in any capacity, whether as owner, overseer, tenant, cropper, or wage hand. Evans was not engaged chiefly or otherwise in that kind of work. Whatever may be the meaning of 'tillage of the soil,' 'farming' includes more than manual farm labor, and the provision in the Bankruptcy Act exempting natural persons engaged chiefly in farming is not limited to persons engaged in such work. Neither is it limited to small farmers or to large farmers. A man may own or rent a small farm and do the work himself, or he may own or rent thousands of acres and operate through overseers and wage hands, without doing any manual labor

himself, and in either case he is engaged in farming. So far as the character of the work is concerned, one's farming activity may be physical or mental or financial, just so long as it is work done in operating a farm. It is all farm work."

In **Wulbern v. Drake**, 120 Fed. 493, the alleged bankrupt managed and controlled plantations containing over 1,100 acres, the greater part of which he owned, the title of the remainder being in his children. Nearly all the land was cultivated by hired labor and the remainder by tenants. He resided on the land and devoted the principal part of his time to the carrying on of its cultivation, upon which he relied for his principal source of income.

It was urged that the land was not cultivated by Drake personally, and that since manual labor was performed by hirelings or tenants he could not be regarded as a farmer. In holding that Drake was engaged in the occupation of farming the court said (l. c. 495):

> "We cannot agree with this view as to the meaning of the term 'farmer,' or 'one engaged in the tillage of the soil,' as the same should be construed in compliance with the spirit and language of the statute; but, on the other hand, we coincide with the conclusion of the District Judge when he declares, 'within the purview of this statute it is understood to mean the business of cultivating land or employing it for purposes of husbandry.'"

Under the foregoing decisions it must be held that under the bankruptcy statute Petitioner would surely be held to be engaged principally in the business of farming and come within the exemption.

If Petitioner had been operating his farms prior to the accident exactly as he is now, that is, by devoting his time to supervision and management and employing persons

to do the manual labor, it surely would be said that he was engaged in the occupation or business of farming. Likewise, we take it, no one would be bold enough to insist that he would now be entitled to disability benefits under this policy, because he had been incapacitated from doing manual labor on these farms. If the operation of his farms in the present manner could ever be considered a business, then it must be considered a business at this time regardless of the fact that at another time he may have operated his business upon a different basis.

His disability has not incapacitated him from engaging in business for remuneration or profit but has only incapacitated him from engaging therein in a certain manner.

It is a recognized fact that two men may be engaged in what is known as "the same business" and yet their activities and duties in the carrying on of their business may be entirely different. For instance, A may be engaged in a clothing business operating a small shop and his duties will include everything from waiting on the customers to doing the janitor work. B, also engaged in the clothing business, as the executive of a large firm, may have duties which only in a small measure or perhaps in no way coincide with the duties of A. Yet, no one will say that both are not engaged in the clothing business. If A was incapacitated to longer carry on his small shop and had the means and ability to acquire a larger organization which he might operate and control through emplyees, then could it be said that he is not then engaged in the clothing business? Unquestionably he would be engaged in business for remuneration or profit in the second instance just the same as in the first. He would simply have changed his methods of operating his business.

The trial court held that Petitioner was not insured against the inability to engage in the occupation followed

at the time of the injury, but that he was only insured against the inability to engage in **any** occupation. The record discloses Petitioner has the means and ability to engage in the business of farming, as the word "business" has been defined by the courts, and is earning a livelihood and profit therefrom. He is engaging in this business now without the performance of manual labor, which, the record discloses, is unnecessary for him to perform in order to make a livelihood from his business. To hold that he is unable to engage in the business of farming because he cannot perform the manual labor he originally engaged in is to hold in definite conflict with lexicographers and courts upon what constitutes a business. The holding is particularly in conflict with the above cases which hold that a party may engage in the business of farming without performing any manual labor incident thereto.

3. **The Petitioner and not his money is actually engaged in business.**

The trial court took the position that since the business that insured is now engaged in requires the use of capital, and the business of farming, if one has no capital, requires the performance of manual labor, that, therefore, the insured is unable to engage in the business of farming. The court said (Tr. 98):

> "What 'business for remuneration or profit' has it been proved this defendant, assuming he is without capital (and that assumption must be made) can engage in? Certainly the assumption that the defendant is without capital must be made. It is the insured (not the insured's money) that must be able to engage in business."

We submit that the trial court erred in this holding and in ruling that under the terms of the policy the insurer is liable unless the insured is able to engage in some business without the benefit of any capital.

The fact that the operation of his business as now conducted requires capital renders him none the less able to engage in the business, since he has the required capital. Business in its modern, everyday use implies the use of capital. Business, as the term is generally used, is distinguished from work or labor in that one engaged in labor is generally considered to be using only his own physical energy, while one engaged in business is generally considered as using capital either in connection with his own physical efforts or the labor of others. A man is engaged in business when he devotes his time to the use and exercise of his capital for the purpose of enhancing the value thereof, or realizing a greater return therefrom than otherwise would be produced.

It is Petitioner himself, and not his money, which is engaged in this business of farming. The farm is rented, and the expenses of operation paid out of the farm income. Without Petitioner there could be no buying and selling of live stock; it is due to Petitioner's energy and skill that the farms are bringing the returns they are; it is Petitioner who controls and operates the entire business and others do the manual labor as directed by Petitioner. This is not the mere reaping of income from capital but **business** as we know it today. Petitioner's profit or loss is solely dependent upon the success or failure of the farm operations directed and controlled by him and this is one of the controlling elements considered by the courts in the bankruptcy cases hereinbefore cited.

It is true that the mere reaping of income from capital does not constitute engaging in business. This question has been passed upon many times by the Federal Courts. In the case of **Washburn v. Commissioner of Internal Revenue**, 51 Fed. (2d) 949, the court had occasion to distinguish between an investor living upon the returns of his property and one engaged in business.

In that case, Washburn was a retired lawyer. While practicing law he had organized a number of corporations and enterprises and he retired from the active practice of law to manage these various enterprises. Under a tax statute it was insisted that he was not engaged in business but that his occupation was guarding his various investments in order to reap the harvest therefrom. The court held, however, that he was engaged in business. The court said (l. c. 953):

> "Much is said in argument as to petitioner being engaged solely in holding the securities of the enterprises in which he was interested, and that he was a mere investor receiving the ordinary returns of ownership. A party may have investments in corporate stock, have no particular occupation, and live on the return of his investments. That would not constitute business under the statute in question. He may, however, take such an active part in the management of the enterprise in which he has investments as to amount to the carrying on of a business. * * * We think the line here is not difficult to draw. The business of petitioner was not merely looking after investments or reaping the return of past labor represented thereby. He had an office with a complete organization, and gave personal attention to, and participated in, the management of these various companies and enterprises in which he had the investments, not for the purpose of conserving them merely, but of carrying them on successfully and making them profitable. To this he gave his entire time, receiving no salary, except such as might cover his expenses. His work for these different enterprises was not merely sporadic, but was a continuous and regular carrying on. Petitioner testifies he worked as hard at his new line of work as he did when he was practicing law. His income was the result, not alone of his investments, but also of his labor expended in connection with the management of the companies in which he had such in-

vestments. The combination of the two is his vocation."

In the case of **Foss v. Commissioner of Internal Revenue,** 75 Fed. (2d) 326, the court again considered a like situation and held that a person of property who devotes his time to the active management of it, is carrying on a business. The court said (l. c. 328):

> "If Foss had employed somebody else to look after his affairs, that person would certainly have been engaged in business; and we think that Foss, in attending to his affairs himself, was equally engaged in business. The line comes between those who take the position of passive investors, doing only what is necessary from an investment point of view, and those who associate themselves actively in the enterprises in which they are financially interested and devote a substantial part of their time to that work as a matter of business."

So in this case Petitioner's livelihood was a result, not of his capital, but of his labor expended in connection with the management of a rented farm and the purchase and sale of live stock. It is the combination of these two which constitutes his business, and it is from this business that he is, under his own testimony, making his livelihood. Petitioner has not been compelled to give up the business of farming. As said in the **Foss Case,** if Petitioner had employed somebody else to look after his farms and live stock business and do what he is now doing with reference thereto, that party would certainly be engaged in business. Petitioner is none the less engaged in business because he is performing the services for himself and his landlord. He has merely changed his method of operating that business in an unsubstantial detail.

It is apparent that the trial court's error in this matter led to his erroneous ruling upon the case. If he had con-

sidered Petitioner's business as a combination of his personal efforts and the rental of a farm, which under all authorities and definitions of the word must be considered, then under the testimony in this record it must be found that Petitioner is engaged in business for remuneration and profit within the provisions of the policy.

4. The Petitioner under his own evidence is able to perform all the duties of his business as now conducted by him.

The Petitioner himself testified that, during the time here in question, he was operating the farms as a grain and stock farm, buying and selling stock and feeding to them the feed raised on the farms (Tr. 31-34). Since his injury the necessity for some of the manual labor in the operations of the farms has been removed by the purchase of modern machinery (Tr. 32). He detailed the duties that he now performs in the operation of these farms (Tr. 31-46). He testified that he was able to perform all these duties.

Petitioner, having himself testified that he is able to perform the duties of the business he is now engaged in, is bound thereby. **Behen v. St. Louis Transit Co.**, 186 Mo. 430, l. c. 440-441, 85 S. W. 346; **McCoy v. Home Oil and Gas Co.** (Mo. App.), 60 S. W. (2d) 715, l. c. 724; **Paetz v. London Guarantee and Accident Co., Ltd.** (Mo. App.), 71 S. W. (2d) 826, l. c. 828.

In the latter case the Court said:

> "If there is any substantial evidence to support the verdict even though meager and contradicted by defendant's evidence, we cannot disturb the verdict. * * * **Of course, this is on the theory that there is no evidence of plaintiff which, unexplained, flatly contradicts his cause of action. In such situation a plain-**

tiff himself destroys his own case, but that is not the situation here." (Emphasis ours.)

VII.

It is established that the amount in controversy exceeds $3,000.00.

The petition on its face discloses that the amount involved in this suit is $3,165.70, which sum is composed of $2,375.00 disability benefit payments and $790.70 premiums which would be waived if petitioner is entitled to disability benefits (Tr. 7).

The answer of Petitioner admitted that there was due him under the provisions of the policy $2,375.00 for monthly payments, admitted that he had paid premiums falling due on said policies in the amount of $790.70, but denied that he had ever claimed a refund of the premiums or was demanding the same (Tr. 14). However, on the trial of the case it was admitted by Petitioner's counsel that the amount of disability benefits involved in the case was $2,375.00 and that the amount of premiums which Defendant had paid was $790.70 (Tr. 24). At the time of making this admission Petitioner made no waiver of any right to his return of premium.

If he was totally disabled and entitled to the disability payments, then, under the provisions of this policy, he was entitled to the return of his premiums during the term of disability. **Lydon v. New York Life Insurance Company,** 89 Fed. (2d) 78 (C. C. A. 8th).

In that case the Circuit Court of Appeals held upon identical policy provisions that premiums must be refunded by the insurer if total disability is established, even though paid without protest by the insured and no demand for the return was made by him but the demand was made by his executor after the insured's death.

The trial court followed the Lydon case and entered its

declaratory judgment that the respondent insurance company was liable to petitioner "for total and permanent disability benefits (including waiver of premiums) for the period beginning May 29, 1936, to January 7, 1938" (Judgment, Tr. 100). The declaratory judgment, therefore, entered by the trial court was for $3,165.70. (Emphasis ours.)

Petitioner recognizes the fact that the judgment was for $3,165.70 in his brief and argument filed with the petition for writ of certiorari when he said, under Point II thereof, page 13, "This action seeks only the determination of a legal right, i. e., whether the respondent is indebted to petitioner in the sum of $3,165.70."

It therefore appears from the face of the record that this judgment entered below and from which the appeal was taken was for $3,165.70, and the jurisdiction of this Court, therefore, is beyond question.

CONCLUSION.

In conclusion, the Respondent submits that the judgment of the Circuit Court of Appeals for the Eighth Circuit is for the right party; is in harmony with the decisions of all of the Missouri Courts of Appeals; is in harmony with the decisions of the Supreme Court of Missouri, and reaches the result which would have been reached by the State Courts upon the facts which are specifically found to exist.

Respectfully submitted,

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